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In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent devotes most of his brief to the contention that the text of Section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1)(H), prohibits the Attorney General from considering the nature or gravity of the fraud committed by an alien at the time of his initial entry into the United States when deciding whether to exercise her discretion to grant the alien a waiver of deportation. Respondent's view is based on a misunderstanding of the statutory text, specifically the requirement that the alien be "otherwise admissible" in order to be eligible for a waiver. Section 241(a)(1)(H) defines the category of aliens who are eligible for a waiver of deportation through that and

other requirements, but then commits entirely to the Attorney General's discretion the decision whether to grant such a waiver to any alien who satisfies the eligibility requirements. Section 241(a)(1)(H) imposes no limitations on the factors the Attorney General may consider in making that determination.

In any event, the Attorney General, through the Board of Immigration Appeals, has to date adopted a more lenient policy: the Board does not include the fraud or misrepresentation at the time of the alien's initial entry in its otherwise comprehensive balancing of factors it deems relevant to the discretionary waiver decision. Consistent with that approach, the acts of fraud taken into account by the Board in declining to grant respondent's request for a waiver of deportation were not committed at the time of respondent's initial entry. Respondent essentially concedes as much, but argues that the Board was nonetheless required to ignore the entire pattern of immigration fraud in which he engaged, both before and after his fraudulent entry. In particular, he argues that, in identifying the relevant equities, the Board must disregard all acts of fraud and misrepresentation committed by the alien to establish a false identity before entering the country and then to maintain that identity after entry—culminating, in respondent's case, in false statements he made four years later in applying for naturalization. Nothing in the text of Section 241(a)(1)(H), or in the nature of discretionary relief under the INA, remotely suggests that the Attorney General must follow such a rule. The courts therefore must defer to the Attorney General's identification of the factors she deems relevant to discretionary waiver determinations under Section 241(a)(1)(H) and her weighing of

those factors in each particular case. The Attorney General's determinations on these issues may be set aside by a court only if they are arbitrary or constitute an abuse of discretion.

1. Respondent recounts in detail the history of Section 241(a)(1)(H) and the earlier statutory versions of that waiver authority. See Resp. Br. 7-18. Respondent relies on that history to argue (Resp. Br. 6, 11-16) that Congress, by use of the phrase "otherwise admissible" in Section 241(a)(1)(H), prohibited the Attorney General from considering "the fraud that gave rise to deportability in determining whether to grant a waiver" (Resp. Br. 6). Respondent misreads the Act. In deciding whether an alien is eligible to be considered for a discretionary waiver, the Attorney General must determine if the alien would be "*otherwise* admissible"—that is, whether the alien would be inadmissible on any ground other than those that are specifically identified in Section 241(a)(1)(H) itself: fraudulent or willful misrepresentation at the time of entry, and the lack of a labor certification or valid visa or other entry document that was a direct result of that fraud or misrepresentation. See 8 U.S.C. 1182(a)(6)(C)(i), (5)(A), and (7)(A). If the alien is inadmissible for any other reason, he is not even eligible for a waiver under Section 241(a)(1)(H). But if the alien is found to be "otherwise admissible" and to meet the other threshold requirements under Section 241(a)(1)(H), the Attorney General may then decide whether to grant a waiver as a matter of discretion. The "otherwise admissible" prerequisite to eligibility places no limits on that ensuing exercise of discretion. Cf. *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985).

Respondent also seeks support from *INS* v. *Errico*, 385 U.S. 214 (1966) (see Resp. Br. 9, 11-12, 16, 20, 28), in which this Court held that, when determining whether an alien was "otherwise admissible" under a predecessor of Section 241(a)(1)(H) (see INA § 241(f), 8 U.S.C. 1251(f) (1964)), an alien who had misrepresented his status to evade quota restrictions was not, for that reason, inadmissible. That holding is fully consistent with the Attorney General's position in this case. When *Errico* was decided in 1966, a waiver under Section 241(f) was *mandatory*; the Attorney General was given no discretion to deny a waiver to an alien who satisfied the eligibility criteria. Thus, the words "otherwise admissible" in Section 241(f) at that time clearly related to the alien's eligibility for the waiver, not to any exercise of discretion, and the Court simply held in *Errico* that an alien was not rendered ineligible on the basis of the underlying quota restriction that his fraud or misrepresentation at entry had been designed to evade. Congress amended Section 241(f) in 1981 to render the waiver determination discretionary. Pub. L. No. 97-116, § 8, 95 Stat. 1616; see Gov't Br. 20-23. The phrase "otherwise admissible," however, continued to pertain to eligibility, not the newly conferred discretionary authority. And because that phrase referred to possible grounds for exclusion *other* than the fraud or misrepresentation at the time of initial entry, it could not in any event be thought to have any bearing on whether the initial fraud or misrepresentation may be considered in the exercise of discretion. Most importantly, however, for those aliens who satisfy the threshold eligibility criteria, the 1981 amendments conferred discretionary authority on the Attorney General in unqualified terms to grant or deny relief.

Other aspects of the revisions made in 1981 likewise refute respondent's notion that Congress intended to mandate a general liberalization of waivers under Section 241(a)(1)(H). For example, Congress added a statutory eligibility requirement that an alien be "in possession of an immigrant visa or equivalent document" at the time of entry, thereby confirming the Court's ruling in *Reid* v. *INS*, 420 U.S. 619, 620 (1975), that had limited *Errico* to its facts and excluded from eligibility those aliens who were deportable on the ground that they entered without inspection. Congress also clarified that, in determining whether an alien meets the "otherwise admissible" requirement, the only grounds of inadmissibility that should not be considered were those listed in 8 U.S.C. 1182(a)(14), (20), and (21) (1970) (now 8 U.S.C. 1182(a)(5)(A) and (7)(A) (lack of necessary labor certification, valid visa or other entry document)). See Pub. L. No. 97-116, § 8, 95 Stat. 1616. And Congress limited even that exception to cases in which the lack of labor certification or other document was a "direct result" of the alien's fraud or misrepresentation at the time of entry. *Ibid.*; see *Errico*, 385 U.S. at 217 (describing prior administrative practice to the same effect).[1] Thus, despite

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[1] A lack of a labor certification or valid visa or other documentation might often be the "direct result" of the fraud at the time of entry because those matters were the very subject or inevitable consequence of the fraud. The pattern of fraudulent conduct cited by the Board in this case, by contrast, is plainly not the "direct result" of respondent's fraud at the time of entry. Thus, the statutory text addressing eligibility for a waiver repudiates respondent's suggestion that Congress intended to require the Attorney General to ignore acts of

respondent's contention that the 1981 amendments "served to expand the waiver" (Resp. Br. 16), those amendments clarified several important limitations on eligibility.

Any doubt about Congress's intention in making the waiver provision discretionary rather than mandatory is dispelled by consideration of the circumstances under which the waiver provision was amended—a portion of the legislative history that respondent ignores. As pointed out in our opening brief (Gov't Br. 21-23), a bill was introduced in Congress in 1979 that, among other things, would have eliminated the statutory waiver altogether. See H.R. 5087, 96th Cong., 1st Sess. The Acting Commissioner of the INS testified, however, that the Department of Justice opposed a total elimination of the waiver and urged, instead, that the waiver be made discretionary with the Attorney General so that relief could be granted "in cases where the misrepresentations may be outweighed by family ties." See *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4, 7-8 (1979). Congress revised the bill consistent with the Department of Justice's suggestion, and the House Report on the revised bill echoed the Department's views. See H.R. Rep. No. 264, 97th Cong., 1st Sess. 25 (1981). The House Report contains no intimation of any intent to require the Attorney General to exercise her newly conferred discretion either broadly or narrowly, or to limit the

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fraud that were distinct from the one committed at the time of entry.

factors that the Attorney General could deem relevant in making individual waiver decisions.

Respondent nonetheless appears to argue (Resp. Br. 12-17) that the 1981 amendments should not be interpreted to confer discretion on the Attorney General to consider the nature or gravity of the initial fraud itself because that was not an issue that had caused confusion among lower courts in interpreting the prior mandatory waiver provision. In respondent's view (Resp. Br. 21-23), the "introduction of discretion" in 1981 applied only in such grey areas of statutory interpretation, or in connection with aliens who came within any expansion of eligibility that might have occurred in 1981. The difficulty with that assertion is that the text Congress enacted does not limit its grant of discretion to the Attorney General to any particular category of cases. Rather, Congress granted the Attorney General unfettered discretion to grant or deny a waiver of deportation with respect to all aliens who satisfy the threshold standards of eligibility under Section 241(a)(1)(H).[2]

2. When respondent turns to the question actually presented by this case—whether the Attorney

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[2] Respondent errs in asserting (Resp. Br. 26) that the government previously conceded that respondent's statutory interpretation is correct. Respondent quotes the Fifth Circuit in *Liawang* v. *INS*, 872 F.2d 685, 687 (1989), stating that, in its brief in that case, "the INS concedes that the original fraudulent act should not be considered as an adverse factor in the balancing equation." The INS did not concede in its brief that its view was compelled by the statutory text, however, and did not indicate that its view was based on anything other than the Board's policy determination that it should not consider the initial-entry fraud for purposes of making a Section 241(a)(1)(H) waiver decision.

General, in exercising her discretion under Section 241(a)(1)(H), may consider fraudulent conduct in which an alien engaged before or after his fraudulent entry—respondent contends (Resp. Br. 29-36) that all of the acts of fraud upon which the Board relied in denying him a waiver must be treated as part of one single fraud at the time of entry, and therefore beyond the discretion of the Attorney General to consider.[3] Respondent's submission would remove the limiting concept of "entry" from the analysis and convert

[3] Respondent also contends (Resp. Br. 29-30) that the Board acted inconsistently with its own policy and weighed respondent's own fraudulent entry (purportedly as the spouse of a United States citizen). Respondent relies on the Board's general description of respondent's pattern of violating the immigration laws, during which the Board mentioned, *inter alia*, respondent's fraudulent entry. Pet. App. 10a. Read in context, however, it is clear that the Board did not weigh that initial-entry fraud when making its decision. In fact, the Board specifically noted that the Immigration Judge acted properly when he disregarded that initial fraud in evaluating the merits of the application for discretionary relief. See *Ibid.* Moreover, immediately prior to its description of respondent's pattern of fraud, the Board stated that the only adverse factors it considered in this case were "the respondent's acts of immigration fraud before and after his 1978 entry into the United States and his apparent lack of candor during the deportation hearing regarding the knowledge of the significance of his fraud." *Ibid.* Immediately after its description of respondent's pattern of fraud, the Board reiterated its view that it could disregard the initial fraud—but not "his remaining acts involving fraud"—for purposes of the waiver determination. *Ibid.* Finally, in the closing paragraph of its opinion, the Board restated that the factors in respondent's favor were outweighed by "the serious nature of respondent's continuing course of immigration violations, both before and after his entry in 1978." *Id.* at 11a.

Section 241(a)(1)(H) into an open-ended license to lie. Nothing in Section 241(a)(1)(H) supports that construction. But if there were any ambiguity on the point, the Attorney General's interpretation of the statutory text is entitled to deference. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987).

Moreover, as we have explained above, the Board's decision not to take into account the initial-entry fraud is a product of the Board's exercise of its own discretion, not the text of Section 241(a)(1)(H) itself. The Board therefore is entitled to even broader deference in articulating the scope of that discretionary exception than it is in interpreting the INA. The Board's conclusion that respondent's course of fraudulent conduct did not fall within its exception for fraud at the time of entry plainly did not constitute an abuse of discretion.

a. Respondent contends (Resp. Br. 31-32) that his participation in his wife's fraudulent entry into the United States under an assumed identity should not be treated as a separate fraud because her entry was necessary to facilitate his own. That is so, he asserts, because his own fraudulent entry was based on his wife's already having entered the United States and obtained false documents identifying her as a U.S. citizen by birth. Contrary to respondent's contention, the fraud in which he participated to enable his wife to enter the United States under an assumed name was quite independent of his own entry. It constituted fraud regardless of whether respondent subsequently entered the United States. Respondent's significant participation in perpetrating that fraud, including his entering into a sham divorce from his wife in 1977 in Taiwan and making available the $60,000 for the purchase of a fraudulent U.S. birth

certificate and passport for his wife in the name of Mary Wong, plainly warranted consideration by the Board when weighing the factors for and against a discretionary waiver of deportation based on respondent's own fraudulent entry. Respondent emphasizes the purpose of Section 241(a)(1)(H) to promote family unity by allowing the Attorney General to forgive fraud or misrepresentation at the time of entry to allow an alien to remain in the United States with his spouse, parent, or child. See Resp. Br. 7-18, 28, 37. But surely Congress did not intend to endorse a practice whereby an alien first helps his relative to enter the United States by fraud and then seeks to have his own fraudulent entry forgiven in the name of preserving family unity in the United States.

b. Respondent also contends (Resp. Br. 32-33) that his submission of a fraudulent petition for naturalization in 1982 was improperly weighed by the Board as an adverse factor, because his representation in the naturalization application that his wife was a U.S. citizen "was simply part of the continuation" of the new identity that he had "assumed as part of his immigration process." Respondent goes so far as to argue (Resp. Br. 33-37) that, whenever an alien enters by a fraud that involves the assumption of a false identity, any subsequent acts that "involve" that false identity should not be regarded as independent of the entry fraud for purposes of a waiver under Section 241(a)(1)(H).

Respondent asserts that to regard other uses of an alien's false identity as separate acts of fraud (as in the case of false statements on respondent's naturalization petition) would "ignore the realities faced by individuals who immigrate based on the creation of a false identity" and would constitute "double count-

ing the fraud." Resp. Br. 34. In other words, according to respondent, once he and his wife "began the charade of their assumed lives, they had to continue using those identities." *Ibid.* But respondent did not "have to" apply for naturalization as a U.S. citizen, much less to do so by submitting a fraudulent petition. By applying for naturalization, respondent sought the significant additional benefits that are part of United States citizenship, greater benefits by far than those he had obtained through his fraudulent entry as an immigrant. Weighing that fraudulent naturalization application did not unfairly "double count" respondent's fraud at entry—it properly weighed the additional fraud that respondent attempted to perpetrate on the United States in order to gain additional benefits. Respondent concedes (Resp. Br. 33) that fraud in an application for naturalization is a sufficient basis for revocation of citizenship. See *Kungys* v. *United States*, 485 U.S. 759 (1988). His attempt to belittle such conduct by asserting that it cannot even be considered as a negative factor in considering whether to grant discretionary relief from deportation is wholly without merit.[4]

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[4] Respondent suggests (Resp. Br. 34-35) that his fraudulent identity and scheme lasted less than six years because, by 1984, his wife "began clearing up the fraud" by reclaiming her true identity. Respondent apparently did not withdraw his naturalization petition, however. See Admin. Rec. 84, 89, 240. Moreover, he did not remarry his wife until 1992, *id.* at 88, after it had become known that the INS was aware of the various fraudulent acts by respondent and his wife. If respondent had remarried his wife sooner, of course, he would not have been able to pursue his fraudulent naturalization application.

More generally, the flaw in respondent's position is that it would transform a limited statutory provision for a discretionary waiver of a discrete ground of deportability based on a discrete act of fraud, into an open-ended immunity from having any immigration consequences attached to an ongoing course of fraudulent conduct. Congress no doubt expected, however, that the aliens who would benefit from Section 241(a)(1)(H) were those who, after their initial entry, had become open and honest members of society. It therefore is pure bootstrap to suggest that a fraudulent entry under Section 241(a)(1)(H) constitutes an excuse for continuing to maintain a "new" (false) identity in the United States.

c. Finally, respondent contends (Resp. Br. 30-31) that the Board committed "a serious error" when it considered, as an adverse factor, respondent's participation in a second sham divorce from his wife in 1985. Respondent asserts that the Board inappropriately mischaracterized the second divorce as "somehow evil," and that describing it "in pejorative terms as a 'sham divorce' is patently unfair," because his wife "recognized her misdeeds" and was not acting in response to detection by immigration authorities. *Id.* at 30, 31. He describes their second divorce as coming "in the middle of his wife's voluntarily coming forward to properly immigrate through her citizen daughter." *Id.* at 31. Respondent claims that "[a]s part of those good faith attempts, [he] and his wife realized that their remarriage in 1978 was not appropriate so they had the marriage invalidated." *Ibid.* He also claims that the divorce was not surreptitious and was a matter of public record, and that the records of his wife's second immigration application would be related to her earlier records "because she

had been fingerprinted as part of both processes." *Ibid.* According to respondent, therefore, "the divorce of which the Board was critical was part of their good faith attempt to set matters straight, so that they could immigrate legally by using their true identities." *Ibid.* Respondent even suggests that the divorce "was arguably one of good faith that should have been considered a positive factor" by the INS. *Ibid.*

Examination of the documents submitted by respondent's wife in support of her supposed attempt to "properly immigrate through her citizen daughter" belie respondent's characterization of the circumstances surrounding their second divorce. As respondent concedes, he and his wife obtained a second divorce not because they had grounds for a legal divorce but, rather, because his wife wanted to shed the fraud of their second marriage under her false name so that she could attempt to immigrate as a relative of her citizen daughter. According to the form submitted by the daughter in question, the daughter became a naturalized citizen on April 20, 1984. Admin. Rec. 238. Approximately two weeks later, she filed a petition to classify respondent's wife as an alien relative for purposes of issuing an immigrant visa, listing the true identity of respondent's wife, but failing to list Mary Wong as a name she knew had been used previously by respondent's wife. *Id.* at 211-212, 237-238.

On December 18, 1984, respondent's wife signed, and swore to the truth of, an application for an immigrant visa and alien registration as the relative of her naturalized citizen daughter. Admin. Rec. 233-236. In that application, however, respondent's wife again included false and misleading information. See

Pet. App. 22a-23a; Admin. Rec. 153-155. For example, in response to a request for other names that she has used or by which she has been known, she listed only her maiden name "Wang," not Mary Wong, as had appeared on the documentation she had been using for the preceding six years. Pet. App. 22a; Admin. Rec. 233. In response to a request for the name and address of her husband, she indicated "N/A" for not applicable. *Ibid.* She also stated that she was divorced and that she had been married only one time. *Ibid.* Yet, she and respondent already had been married twice by that time. See Pet. App. 22a; Admin. Rec. 127-128, 134, 242-243. And respondent was still her husband at that time. Their second divorce terminated their second marriage on February 13, 1985. Pet. App. 17a-18a; Admin. Rec. 252. Respondent's wife misrepresented the dates of her previous residence in and visits to the United States. Pet. App. 22a-23a; see Admin. Rec. 154-155, 234. Respondent's wife also checked "no" in response to the question whether she was within the class of aliens who had procured a visa or other documentation by fraud or willful misrepresentation. *Id.* at 235.

Thus, although the record does not provide a basis for directly attributing to respondent the false and misleading statements of his wife, the second divorce between respondent and his wife in 1985 cannot be characterized as "part of their good faith attempt to set matters straight," as respondent claims. In light of the record in this case, the Board plainly did not abuse its discretion in regarding that divorce—as well as the overall pattern of fraudulent conduct in which respondent participated before and after his unlawful entry—as negative factors weighing against

an award of discretionary relief. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 451-452 (1985).

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

AUGUST 1996